

## REASONS FOR NOT PROVIDING INFORMATION

### An exemption applies

#### **Section 38(1)(b) – applicant has asked for personal data of a third party**

An exemption under section 38(1)(b) of FOISA (personal information) applies to some of the information requested because it is personal data of a third party, eg names/contact details of individuals, and disclosing it would contravene the data protection principles in Schedule 1 to the Data Protection Act 1998. This exemption is not subject to the 'public interest test', so we are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exemption.

### An exemption applies, subject to the public interest test

#### **Section 29(1)(a) – formulation or development of government policy**

An exemption under section 29(1)(a) of FOISA (formulation or development of government policy) applies to some of the information requested because it relates to the formulation/development of the Scottish Government's policy on the issue of whether or not to hold a public inquiry into undercover policing in Scotland.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in high quality policy and decision-making, and in the properly considered implementation and development of policies and decisions. This means that Ministers and officials need to be able to consider all available options and to debate those rigorously, to fully understand their possible implications. Their candour in doing so will be affected by their assessment of whether the discussions on this issue will be disclosed in the near future, when it may undermine or constrain the Government's view on that policy while it is still under discussion and development.

#### **Section 29(1)(b) – Ministerial communications**

An exemption under section 29(1)(b) of FOISA (Ministerial communications) applies to some of the information requested because it relates to communications between Scottish Ministers.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public



interest in allowing Ministers a private space within which issues can be explored and refined, until the Government as a whole can reach a decision that is sound and likely to be effective. This private thinking space also allows for all options to be properly considered, so that good decisions can be taken. Premature disclosure is likely to undermine the full and frank discussion of issues between Ministers, which in turn will undermine the quality of the decision making process.

### **Section 30(a) – convention of collective responsibility of Scottish Ministers**

An exemption under section 30(a) of FOISA (convention of collective responsibility of Scottish Ministers) applies to some of the information requested. This exemption applies because disclosure would, or would be likely to, prejudice substantially the convention of the collective responsibility of Scottish Ministers for the Scottish Government's decision on the issue of whether or not to hold a public inquiry into undercover policing in Scotland. Government in Scotland, as in the rest of the UK, has long worked under the convention that Ministers are collectively responsible for decisions and their delivery. Collective responsibility requires collective discretion, and ensures that Ministers can express their views frankly in internal discussion of an issue while maintaining a united front once decisions have been reached. Disclosing communications between individual Ministers would prejudice substantially the maintenance of the convention.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in maintaining collective responsibility for the Scottish Government's decision on this issue, once a collective decision has been made. Disclosure of these internal discussions between Ministers would be likely to have the effect of undermining the Government's position on this issue, and thus the effectiveness of the decision, which would not be in the public interest.

### **Section 30(b)(i) – free and frank provision of advice**

An exemption under section 30(b)(i) of FOISA (free and frank provision of advice) applies to some of the information requested. This exemption applies because disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption recognised the need for officials to have a private space within which to provide free and frank advice to Ministers and other officials before the Scottish Government reaches a settled public view. Disclosing the content of free and frank advice on the issue of whether or not to hold a public inquiry into undercover policing in Scotland will substantially inhibit the provision of such advice in the future, particularly because these discussions relate to the sensitive issue of undercover policing.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on



balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in allowing a private space within which officials can provide full and frank advice to Ministers and other officials, as part of the process of exploring and refining the Government's position on the issue of whether or not to hold a public inquiry into undercover policing in Scotland, until the Government as a whole can adopt a decision that is sound and likely to be effective. This private thinking space is essential to enable all options to be properly considered, based on the best available advice, so that good decisions can be taken. Premature disclosure is likely to undermine the full and frank discussion of issues between Ministers and officials, which in turn will undermine the quality of the decision making process, which would not be in the public interest.

### **Section 30(b)(ii) – free and frank exchange of views for the purposes of deliberation**

An exemption under section 30(b)(ii) of FOISA (free and frank exchange of views) applies to some of the information requested. This exemption applies because disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption recognised the need for Ministers and officials to have a private space within which to discuss and explore options before the Scottish Government reaches a settled public view. Disclosing the content of free and frank discussions on the issue of whether or not to hold a public inquiry into undercover policing in Scotland will substantially inhibit such discussions in the future, particularly because these discussions relate to the sensitive issue of undercover policing.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in allowing Ministers and officials a private space within which to explore and refine the Government's position on the issue of whether or not to hold a public inquiry into undercover policing in Scotland, until the Government as a whole can adopt a decision that is sound and likely to be effective. This private thinking space is essential to enable all options to be properly considered, so that good decisions can be taken. Premature disclosure is likely to undermine the full and frank discussion of issues between Ministers and officials, which in turn will undermine the quality of the decision making process, which would not be in the public interest.

Further to the above, exemptions under sections 30(b)(i) and 30(b)(ii) of FOISA (free and frank advice and exchange of views) apply because disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice and exchange of views for the purposes of deliberation. The exemptions recognise the need for Ministers to have a private space within which to seek advice and views from officials before reaching the settled public position which will be given in whatever final SPQ answer(s), press lines, and lines to take are used. Disclosing the content of free and frank briefing material on the issue of whether or not to hold a public inquiry into undercover policing in Scotland will substantially inhibit



such briefing in the future, particularly because these discussions relate to the sensitive or controversial issue of undercover policing.

These exemptions are subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemptions. We have found that, on balance, the public interest lies in favour of upholding the exemptions. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in allowing a private space within which officials can provide free and frank advice and views to Ministers in briefing for SPQ answer(s), press lines and lines to take. It is clearly in the public interest that Ministers can properly answer Parliamentary questions, provide sound information to Parliament (to which they are accountable), and robustly defend the Government's policies and decisions. They need full and candid advice from officials to enable them to do so. Premature disclosure of this type of information could lead to a reduction in the comprehensiveness and frankness of such advice and views in the future, which would not be in the public interest.

Fifteen Scottish Parliamentary Questions fall within scope of your request. While these are publicly available at <http://www.parliament.scot/parliamentarybusiness/98191.aspx>, the relevant numbers are S5W: 05699, 05700, 05701, 09231, 09233, 09753, 09575, 09756, 09757, 09758, 11251, 13147 (all 2017), 13748, 13843 and 14108 (the latter three 2018).

### **Section 30(c) – substantial prejudice to the effective conduct of public affairs**

An exemption under section 30(c) of FOISA (prejudice to effective conduct of public affairs) applies to some of the information requested. It is essential for Ministers and officials to be able to communicate, often in confidence, with external stakeholders on a range of issues, including on the issue of whether or not to hold a public inquiry into undercover policing in Scotland. Disclosing the content of these communications, particularly without the consent of the stakeholder, is likely to undermine their trust in the Scottish Government and will substantially inhibit communications on this type of issue in the future. These stakeholders will be reluctant to provide their views fully and frankly if they believe that their views are likely to be made public, particularly while these communications relate to the sensitive issue of undercover policing. This would significantly harm the Government's ability to carry out many aspects of its work, and could adversely affect its ability to gather all of the evidence it needs to make fully informed decisions.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in allowing Ministers and officials a private space within which to communicate with appropriate external stakeholders as part of the process of exploring and refining the





Government's position on the issue of whether or not to hold a public inquiry into undercover policing in Scotland, until the Government as a whole can adopt a decision that is sound and likely to be effective. This private space is essential to enable all options to be properly considered, so that good decisions can be taken based on fully informed advice and evidence. Disclosure is likely to undermine the full and frank discussion of issues between the Scottish Government and these stakeholders, which in turn will undermine the quality of the decision making process, which would not be in the public interest.

### **Section 36(1) – legal advice**

An exemption under section 36(1) of FOISA (confidentiality in legal proceedings) applies to some of the information requested because it is legal advice and disclosure would breach legal professional privilege.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is some public interest in release as part of open and transparent government, and to inform public debate. However, this is outweighed by the strong public interest in maintaining the right to confidentiality of communications between legal advisers and clients, to ensure that Ministers and officials are able to receive legal advice in confidence, like any other public or private organisation. The release of the content of such legal advice is likely to be appropriate only in highly compelling cases. This has been recognised by both the Scottish Information Commissioner and the courts – see, for example, the House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48.

There is a very strong public interest in maintaining confidentiality of communications between legal adviser and client on administration of justice grounds. It is clearly in the public interest for lawyers to be able to provide free and frank legal advice to their clients, considering and discussing all issues and options, without fear that the advice might be disclosed and potentially taken out of context. It is also in the public interest that decisions are taken by the Government in a fully informed legal context. Ministers and officials therefore need high-quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of relevant facts. Without such legal advice, which can only be provided frankly and comprehensively in the knowledge that it will be kept in confidence, the quality of the Government's decision-making would be much reduced since it would not be fully informed.

There is no public interest consideration that is sufficient to outweigh the strong inherent public interest in maintaining legal professional privilege.

